IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-622

JAMES MABRY, COMMISSIONER
ARKANSAS DEPARTMENT OF CORRECTION ..... *Petitioner*

vs.

FRANCIS EDWARD KLIMAS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner, James Mabry, Commissioner of the Arkansas Department of Correction, respectfully prays that a Writ of Certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Eighth Circuit, entered in this proceeding on May 30, 1979.

I. OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 599 F.2d 842 (8th Cir. 1979), and is attached hereto at Appendix A. The decision of the United States Court of Appeals for the Eighth Circuit upon petitioner's request for a rehearing *en banc* is reported as *Klimas* v. *Mabry*,

No. 78-1663, dissenting opinion of Judge Henley, August 13, 1979, and is attached hereto as Appendix A.

II. JURISDICTION

The opinion of the Court of Appeals was filed on May 30, 1979. Petitioner filed a timely petition for rehearing, which was denied by the Court of Appeals on August 13, 1979. Petitioner thereafter requested a stay of mandate in order to petition this Court for a Writ of Certiorari, which was granted on August 28, 1979. This petition is filed within thirty days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

III. QUESTION PRESENTED

Whether the Arkansas statute giving the Arkansas Supreme Court the power to modify judgments or reduce sentences imposed by trial courts, is violative of the Sixth and Fourteenth Amendments when the statute is applied in the case of a recidivist offender.

IV. CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining

> witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides:

> §1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The pertinent Statutory provisions are as follows:

Ark. Stat. Ann. § 27-2144 (Repl. 1962)
Ark. Stat. Ann. § 43-2328 (Supp. 1975)
Ark. Stat. Ann. § 43-2306 (Repl. 1964)
Ark. Stat. Ann. § 43-2725.2 (Supp. 1975)
Ark. Stat. Ann. § 43-2330.1 (Supp. 1975)
Ark. Stat. Ann. § 41-102 (Repl. 1977)

Copies of these statutes are set forth in the petition.

V. STATEMENT OF THE CASE

A. The State Proceedings:

Petitioner, James Mabry, was at the time of the filing of this petition for writ of habeas corpus, the Commissioner of the Arkansas Department of Correction. Respondent, Francis Edward Klimas, is a prisoner incarcerated in the Arkansas Department of Correction. Respondent was convicted in the Circuit Court of Jefferson County, Arkansas, on April 23, 1975, of burglary and grand larceny. Once the jury returned respondent's conviction of those two offenses, the jury heard evidence of respondent's prior convictions and was to consider those prior convictions found to exist in sentencing respondent in accordance with Ark. Stat. Ann. §43-2328 and 43-2330.1, the recidivist offender statutes then in effect. To that end, the prosecution presented evidence that respondent had been convicted of thirteen previous felonies, seven of which occurred in Missouri and six in Arkansas. The jury found that respondent had previously been convicted of three prior felonies and was thus an habitual offender, and fixed his punishment at thirty-one and one-half years for each offense (burglary and grand larceny). Whereupon, the trial court entered judgment, and directed that the sentences run consecutively. Respondent was thus sentenced by the jury to serve sixty-three years in the Arkansas Department of Correction.

Respondent appealed to the Supreme Court of Arkansas, citing as error *inter alia* that the records of the seven Missouri convictions failed to show whether respondent was represented by counsel at those proceedings, and were therefore unconstitutionally admitted into evidence in the sentence enhancement portion of respondent's trial. The Arkansas Supreme

Court agreed. *Klimas* v. *State*, 259 Ark. 301, 534 S.W.2d 202 (1976), *cert. denied* 429 U.S. 846 (1976). Under the authority granted the Arkansas Supreme Court by Ark. Stat. Ann. §27-2144 (Repl. 1962), the Court reduced the penalty to three years imprisonment, the minimum sentence respondent could have received on the charges. The State petitioned the Court for a rehearing, citing the six unchallenged, and valid, Arkansas convictions as sufficient to support the jury's finding that respondent was, in fact and under the statute, an habitual offender. On rehearing, the Arkansas Supreme Court re-assessed petitioner's sentence at twenty-one years imprisonment for each offense, to run consecutively. This, the Court felt, was the minimum sentence for one convicted of three or more prior felonies. *Klimas* v. *State, supra*. The final sentence as approved by the Arkansas Supreme Court was, therefore, imprisonment for forty-two years. Respondent then filed a petition for writ of certiorari in this Court, which was denied *sub nomine Klimas* v. *Arkansas*, 429 U.S. 846 (1976).

B. The Federal Proceedings:

Following this Court's denial of his petition for a writ of certiorari, respondent filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Arkansas. That petition was dismissed by the District Court on the grounds that respondent had failed to allege facts sufficient to constitute any violation of a Constitutional right. Apparently, the District Court also felt that because this Court had denied respondent's petition for writ of certiorari, the District Court was without jurisdiction to hear the case.

Respondent filed and prosecuted an appeal to the United States Court of Appeals for the Eighth Circuit. That Court

reversed the judgement of the District Court in *Klimas* v. *Mabry*, 599 F.2d 842 (8th Cir. 1979), which opinion is attached hereto in Appendix A. The Court of Appeals found that the sentence-enhancement statute in issue, Ark. Stats. Ann. §43-2330.1, conferred upon respondent an absolute right to a trial by jury on the issue of his status as an habitual offender and the punishment to be imposed. Therefore, the Court of Appeals held that the action taken by the Arkansas Supreme Court, pursuant to Ark. Stat. Ann. § 27-2144 (Repl. 1962), to reduce respondent's sentence deprived respondent of his statutory right to such jury trial, in violation of the Sixth and Fourteenth Amendments to the United States Constitution. The Court of Appeals remanded the case to the District Court, with instructions to hold the writ in abeyance until the State retried the respondent on the sentence by jury, in accordance with what the Court of Appeals felt to be the Arkansas law. *Klimas* v. *Mabry, supra.*

Petitioner requested a rehearing, which request the Court of Appeals treated as a request for a rehearing *en banc*. Petitioner drew the Court of Appeals' attention to the fact that the power of the Arkansas Supreme Court to modify the judgments of inferior courts is statutory, and is supported by a long line of state and federal cases. The petition for a rehearing *en banc* was denied, three Judges dissenting. *Klimas v. Mabry,* No. 78-1663, slip op. August 13, 1979, Judge Henley dissenting.

In sum, Judge Henley pointed out that, while the Arkansas Supreme Court may have been mistaken as to the length of the minimum sentence to which respondent could have been sentenced (twenty-one, as opposed to forty-two years, by making the sentences run concurrently), the Arkansas Supreme Court was not mistaken as to its statutory power to modify the sentence imposed by the trial court. Judge Henley also noted

that there is no procedure in Arkansas for resentencing by jury. Further, Judge Henley noted that the holding by the Court of Appeals vitiated a useful and desirable Arkansas procedural device: Allowing the State Attorney General a limited time to accept a lesser sentence in lieu of retrial. Therefore, he proposed that the Court of Appeals remand the case to the District Court with instructions to hold in abeyance issuing the writ of habeas corpus until the State either retried respondent on all issues, including guilt or innocence, or reduced the sentence to twenty-one years.

It is from the decision of the Court of Appeals reversing the District Court herein, and from the denial of petitioner's request for a rehearing, that petitioner requests that this Court issue a writ of certiorari to the Court of Appeals below.

VI. REASONS FOR GRANTING THE WRIT

A. THE HOLDING OF THE COURT OF APPEALS BELOW HAS, IN EFFECT, DECLARED UNCONSTITUTIONAL THE ARKANSAS STATUTE ALLOWING THE ARKANSAS SUPREME COURT TO REDUCE SENTENCES IMPOSED IN TRIAL COURTS, WHEN APPLIED IN THE CASES OF THOSE DEFENDANTS FOUND TO BE HABITUAL OFFENDERS UNDER ARKANSAS LAW.

The essence of the Court of Appeals' decision herein is that the Arkansas Supreme Court denied respondent due process and his Sixth Amendment right to trial by jury on both the issue of his status as an habitual offender and the issue of the sentence to be imposed when the Arkansas Court reduced his sentence to the minimum sentence allowed a recidivist felon with three or

more prior felony convictions under the then prevailing recidivist offender statute, Ark. Stat. Ann. §43-2328 (Supp. 1975). *Klimas* v. *State, supra*. The fallacy of the Court of Appeals' reasoning is that neither the Sixth Amendment to the United States Constitution, nor the Arkansas Constitution, nor statutory law grant defendant an absolute right to sentencing by a jury.

It is well settled that nothing in the due process clause of the Fourteenth Amendment of the United States Constitution gives a defendant in a criminal prosecution the right to have punishment assessed by jury. See, e.g., *Payne* v. *Nash*, 327 F.2d 197 (8th Cir. 1964); *Froman* v. *State*, 232 Ark. 697, 339 S.W.2d 601 (1960); *Bowman* v. *State*, 231 Ga. 220, 200 S.E.2d 880, (1973).

Similarly nothing in the Arkansas Constitution confers such a right upon a criminal defendant. While it is true that when trial by jury is requested, Arkansas juries generally sentence as well as determine guilt or innocence, their power to sentence is not absolute. Pursuant to Ark. Stat. Ann. §43-2306 (Repl. 1964),

> When a jury find a verdict of guilty, and fail to agree on the punishment to be inflicted, or do not declare such punishment in their verdict, or *if they assess a punishment not authorized by law*, and all cases of a judgment on confession, the court shall assess and declare the punishment, and render judgment accordingly. (Emphasis supplied)

This statute permitting the trial court to fix punishment has been declared constitutional, *Froman* v. *State, supra*. When a jury assesses a punishment under the habitual criminal statute bas-

ed upon a constitutionally invalid prior conviction and therefore a punishment unauthorized by law, the trial court, pursuant to §43-2306, is empowered to assess that punishment validly authorized by law.

If the error in sentencing is not called to the trial court's attention before it loses jurisdiction, the Arkansas Supreme Court is similarly by statute given authority to modify a sentence not authorized under the law. Since at least 1871, the Arkansas legislature has vested the Arkansas Supreme Court with the power to modify a sentence imposed by a jury, via what is now codified as Ark. Stats. Ann. § 27-2144 (Repl. 1962). That statute now states:

> 27-2144. Power to reverse, affirm, or modify — Time for taking out mandate — Costs on failure to take out. — The Supreme Court may reverse, affirm, *or modify* the judgement or order appealed from, *in whole or in part*, and as to any or all parties, and when the judgment or order has been reversed, or affirmed, the Supreme Court may remand or dismiss the cause and enter such judgement upon the record as it may in its discretion deem just; provided, when a cause is affirmed, or reversed and remanded, the mandate must be taken out and filed in the court from which the appeal was taken by the petitioner or defendant within one (1) year from the rendition of the judgement, affirming or reversing the cause, and not thereafter; and immediately upon the expiration of the period of one (1) year after the judgment of reversal is entered, when the mandate is not taken out, the clerk of the Supreme Court shall upon application of the party entitled thereto issue an execution for all costs accrued up to the date of reversal in the Supreme Court and in the Court from which said cause

> has been appealed, (Civil Code, § 16; Act Mar. 27, 1871, no. 48 § 1 (16 1st par), p. 219; (other act omitted). (Emphasis supplied).

This statute has been deemed applicable to criminal cases since 1892. *Simpson* v. *State,* 56 Ark. 5, 19 S.W. 99 (1892). See also, *Hadley* v. *State,* 196 Ark. 307. 117 S.W.2d 352 (1938). The Arkansas Court of Appeals recently re-affirmed its power under the statute in *Couch* v. *State,* No. CACR-79-62, slip op. (September 26, 1979).

The power of the Arkansas Supreme Court to modify via reduction of a criminal sentence was further conferred by the General Assembly in Act 333 of 1971, which modified the procedure in the appeal of criminal cases. Section 12 of that Act, now codified as Ark. Stats. Ann. § 43-2725.2 (Supp. 1973 and 1975), states:

> 43-2725.2. Action to be taken on appeal. — A conviction shall be reversed and a new trial ordered where the Supreme Court finds that the conviction is contrary to the Constitution, the laws of Arkansas, or for any reason determines that the appellant did not have a fair trial. Where appropriate, the Supreme Court shall reverse the conviction and order the appellant discharged. In all other cases, the conviction must be affirmed, *but the sentence of the appellant may be reduced if it is deemed excessive.* (Acts 1971, No. 333, § 12, p. 827). (Emphasis supplied).

The Arkansas Supreme Court fully discussed its powers to modify sentences, pursuant to these statutes, in *Collins* v. *State,* 261 Ark. 195, 211-213, 215, 548 S.W.2d 106 (1977), *cert. denied,* 434 U.S. 878 (1977). There, the Court stated:

> On appellate review, this court has the power to reduce the punishment, from that imposed by a circuit court for a higher degree of an offense than the evidence will support, to the punishment for that degree which the evidence will support. (Citations omitted). We have held that Ark. Stats. Ann. §27-2144 (Repl. 1962) empowering this court to modify the judgment or order appealed from and enter such judgment as this court may, in its discretion deem just, is applicable to criminal cases. (Citations omitted) We have excercised this power in homicide cases (Citations omitted) and in cases where the death penalty had been imposed. . . In (*Blake* v. *State,* 186 Ark. 77, 52 S.W.2d 644), we had this to say about our practice in the exercise of this power:
>
> > This power has been frequently exercised by this court in subsequent cases, and while the practice usually followed is to reverse the judgment on account of the excessive punishment, unless the Attorney General will consent that the trial court impose a lower sentence, that practice has not always been followed. The court, when it is thought proper to do so, has itself fixed the reduced punishment.
>
> . . .We have also recently said that we might reduce the penalty unless the Attorney General elects to take a new trial. (Citation omitted) In *Hadley* v. *State,* 196 Ark. 307, 117 S.W.2d 352, this court observed that there were numerous instances in which it had reduced the punishment of an appellant from death or life imprisonment. We lately recognized that we had the power to fix a reduced punishment where the death penalty had been imposed. . .(Citation omitted).

The power of this court to reduce a sentence if it is deemed excessive was recognized in Ark. Stats. Ann. §43-2725.2 (Supp. 1975). We have construed that act to preserve the distinction between executive clemency and appropriate judicial review of a sentence where there is error pertaining to the sentence. In *Abbot* v. *State*, 256 Ark. 558, 508 S.W. 2d 733, we said:

> . . .Although we have previously found it unnecessary to pass directly on the constitutionality of this provision insofar as it might be construed to empower this court to reduce a sentence otherwise proper and within statutory limits in cases arising after passage of the act, it should be clear that legislative action cannot override constitutional provisions. We strongly intimated that this act was ineffective to overrule the holding in (two Arkansas cases), and cited the case of *People* v. *Odle*, 37 Cal.2d 52, 230 P.2d 345 (1951). In that case a similar statute was construed by the California court to do no more than authorize it to reduce the punishment in lieu of granting a new trial, when the only error found on appellate review related to the punishment imposed and was prejudicial. It specifically held that the statute otherwise, said the court, speaking through Justice Traynor, would give the reviewing court clemency powers similar to those vested in the Governor by the California Constitution. That court clearly recognized that any construction of the statute extending the power of the appellate court any further would raise serious constitutional questions relating to the separation of powers. We think the construction given the California statute by that state's Supreme Court was correct and that the same construction should be given our statute.

> When given that construction, it is clearly constitutional. If construed to give this court the power to reduce a sentence in the absence of error pertaining to the sentence, the statute would be unconstitutional (under the Arkansas Constitution) and upon the authority of (Arkansas case law). *Collins* v. *State, supra*, 261 Ark at 211-213.

The Arkansas Supreme Court went on to state:

"In McCall v. State, 230 Ark 425, 323 S.W.2d 421 (1959), it was recognized that this court could reduce the punishment for the purpose of eliminating some error committed by the trial court. Somewhat later . . . we considered the matter in *Clark* v. *State*, 246 Ark. 876, 440 S.W.2d 205, saying:

> Thus the trial court's error had no bearing on the jury's determination of guilt or innocence. It affected only the extent of the punishment to be imposed. In that situation, we have a choice among several corrective measures. We may, depending upon the facts, reduce the punishment to the maximum for the lesser offense, fix it ourselves at some intermediate point, remand the case to the trial court for the assessment of the penalty, or grant a new trial either absolutely or conditionally. Several of these cases were discussed in *Bailey* v. *State*, 206 Ark. 121, 173 S.W.2d 1010 (1943).

Collins v. *State, supra*, 261 Ark. at 215. It is noted that when the Court refers to remanding the case to the trial court for assessment of the sentence in *McCall, supra*, the Court is referring to the established Arkansas practice of remanding the case for a

new trial, unless the Attorney General accepts a lesser penalty. *Bailey* v. *State, supra,* at 206 Ark. 132.

That the Arkansas Supreme Court has the power to reduce sentences in cases such as the case at bar is beyond cavil. In *Wilburn* v. *State,* 253 Ark. 608, 487 S.W. 2d 600 (1972), the Arkansas Supreme Court was confronted with an appellant who was sentenced under Ark. Stats. Ann. §43-2328(2) as a third offender. On appeal, Wilburn successfully argued that one of the two prior convictions introduced was unconstitutionally admitted into evidence, pursuant to this Court's holding in *Burgett* v. *Texas,* 389 U.S. 109 (1967). In rejecting his contention that the conviction should be reversed and remanded, the Arkansas Supreme Court held:

> The appellant does rely heavily on *Burgett* v. *Texas, supra,* and argues that his conviction should be reversed. We agree with the state, however, that *Burgett* is distinguishable from the case at bar in that the questioned evidence of the prior conviction in *Burgett* was admitted prior to determination of the defendant's guilt by the jury on the crime for which he was being tried. *We also agree with the state that the error involved does not call for a new trial in the case at bar because this court has the power to modify the judgment of a trial court, Ark Stats. Ann. §27-2144 (Repl. 1962), and to reduce the penalty in criminal cases to that penalty which is appropriate for the crime involved.* (Citations omitted) (Emphasis supplied).

In *McConahay* v. *State,* 257 Ark. 328, 516 S.W. 2d 887 (1974), the Arkansas Supreme Court again applied §27-2144 to an unconstitutional usage of prior convictions to enhance the sentence of an habitual criminal. In that case, upon revising appellant's sentence, the Arkansas Supreme Court noted that the procedure thus employed was "well established," citing

Roach v. *State,* 255 Ark. 773, 503 S.W. 2d 467 (1973); *Richards* v. *State,* 254 Ark. 760, 498 S.W. 2d 1 (1973); and *Wilburn* v. *State, supra*..

While it is true that a jury must find the defendant has been convicted of prior felonies before a particular enhanced sentence can be imposed, the Arkansas procedure for correcting an unauthorized punishment at either the trial level or on appeal abrogates no constitutional or statutory right of the defendant. Generally, the issue of whether a state court properly complied with the provisions of state law is considered purely a matter of local concern and is not reviewable by federal courts under the due process clause of the federal constitution. See, e.g., *Buchalter* v. *New York,* 319 U.S. 427 (1943). Here it is undisputed that the state complied with established procedures. Nevertheless, the Court of Appeals erroneously concluded that the long established Arkansas procedures for correcting an unauthorized sentence denied respondent his right to due process.

As jurors have the power of sentencing in every criminal case tried to a jury, they likewise have the power to fix the sentences of those who are recidivists. That power is granted by Ark. Stats. Ann. §43-2330.1 (Supp. 1975), which states:

> 43-2330.1. Trial procedure for habitual criminals. — The following trial procedure shall be adhered to in cases involving habitual criminals:
>
> (1) The jury shall first hear all of the evidence pertaining to the current charge against the defendant and shall retire to reach its verdict, as to this charge, based only upon such evidence; provided, however, that nothing herein shall prohibit cross-examination of a defendant as

to previous convictions when the defendant takes the stand in his own defense.

(2) If the defendant is found guilty, the same jury shall sit again and hear evidence of defendant's prior conviction(s). Provided, that the defendant shall have the right to deny the existence of any prior conviction(s), and to offer evidence in support thereof.

(3) The jury shall again retire, and if it is found that the prior conviction(s) exists, or if the defendant admits such previous conviction(s), then the prior conviction(s) shall be considered in fixing the punishment for the current offense for which the defendant has been convicted in accordance with Section 1 (§43-2328) hereof.

The Arkansas statute, §43-2330.1, does confer upon a recidivist defendant the right to a jury determination of his status as an habitual offender. It also allows the jury, once it has determined that the defendant is an habitual offender, to decide what punishment, within the statutory limits, is proper. However, it does not mandate that the jury determine the sentence. Just as with the determination of sentence for a non-recidivist defendant the trial court shall assess the punishment if the jury cannot agree or if they assess an unauthorized punishment. Ark. Stat. Ann. §43-2306.

In short, the respondent here had no more of an absolute right to have a jury determine his sentence than the ordinary defendant in a criminal trial. The Court of Appeals' decision, in effect, raises the determination of habitual criminality to the level of a substantive offense and gives a recidivist defendant greater rights than an ordinary defendant.

The Arkansas Habitual criminal act does not create a distinct additional offense or independent crime but simply authorizes a more severe punishment upon proper presentation of evidence, and furnishes a guide for the court or jury in fixing the final punishment in event of conviction of the offense charged. *Finch* v. *State*, 262 Ark. 313, 556 S.W. 2d 434 (1977).

Here the respondent was afforded his right under §43-2330.1 to have the jury determine whether he had previously been convicted of felonies so as to trigger the application of the punishments set out in Ark. Stat. Ann. §43-2328 (Supp. 1975). The State presented proof of thirteen previous convictions, six Arkansas convictions and seven Missouri convictions. The admissibility of the Missouri convictions was objected to on the ground that the evidence did not demonstrate that he had been represented by counsel and were thus invalid. The Arkansas convictions, which were indisputably valid, were unchallenged.

Pursuant to Ark. Stat. Ann. §43-2330.1(3) (Supp. 1975) the defendant has the right to deny the existence of any prior conviction(s) and offer evidence in support thereof. However, if the defendant admits such previous conviction(s), then the prior conviction(s) must be considered by the jury in fixing the punishment for the current offense. §43-2330.1(3) Here respondent never challenged the existence or validity of the six Arkansas convictions at trial or on appeal, but instead tacitly admitted their existence and validity. Therefore, the jury was bound by statute to find respondent an habitual criminal and to consider the six prior convictions in considering respondent's punishment. With regard to the seven Missouri convictions which were not uncontested, the jury had the discretion to determine from the evidence whether those seven valid prior convictions existed.

Thus, respondent was afforded the only right he had under federal and state law, the right to a jury determination of his status as an habitual offender and the number of prior convictions he had to determine the applicable sentence under §43-2328.

When it was determined on appeal that the evidence of the seven prior Missouri convictions was wrongfully admitted, the Arkansas Supreme Court, properly exercising its statutory authority under Ark. Stat. Ann. §27-2144 (Repl. 1962) and §43-2725.2 (Supp. 1975), made the determination of what was the minimum sentence properly authorized by law. In so doing, respondent was denied no right under the federal or state constitutions nor under state statutory law. The decision of the Court of Appeals to the contrary is erroneous.

Further, the Court of Appeals bases its decision on fundamentally opposing viewpoints. On the one hand, the Court of Appeals states that the Arkansas Supreme Court is without authority to reduce respondent's sentence, because to do so deprives respondent of a statutory right to a jury trial on the issue of sentence. However, the Court of Appeals attempts, unsuccessfully, to distinguish *Wilburn, supra,* by stating that in that case *all* the prior convictions were invalid for purposes of sentence enhancement. *Klimas* v. *Mabry, supra,* at 599 F. 2d at 849 n. 10. Of course, in that case only one of the two prior convictions was held to be invalid. In other words, the Court of Appeals has approved the procedure of the Arkansas Supreme Court in *Wilburn, supra,* and condemned it in the instant case, all within the same opinion.

Respondent submits that, to the extent that the opinion of the Court of Appeals in this case intimates that the Arkansas

Statutes conferring on the Arkansas Supreme Court the power to modify jury-imposed sentences is unconstitutional under the Sixth Amendment, the Court of Appeals is in error. First, that issue was not before the Court of Appeals in this case. Second, there is a long-established rule that a presumption exists as to the constitutionality of the act of a state legislature, and that all doubts must be resolved in support of the act. *United States* v. *Five Gambling Devices Labelled in Part "Mills,"* 346 U.S. 441 (1953); *Butterfield* v. *Stranahan,* 192 U.S. 470 (1904); *Davies Warehouse Co.* v. *Bowles,* 321 U.S. 144 (1944).

It is noted as well, that in the instant case the Court of Appeals has ignored its own prior holdings in regard to this facet of Arkansas law. See, *Cox* v. *Hutto,* 589 F. 2d 394 (8th Cir. 1979).

B. THE DECISION OF THE COURT OF APPEALS BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND THE DECISIONS OF OTHER COURTS OF APPEALS.

In its decision below, the Court of Appeals stated:

> We find, however, that under the particular facts of this case, the failure of the Arkansas Supreme Court to follow the sentencing procedure required by the Arkansas Habitual Criminal Act, Ark. Stat. Ann. §41-1005 or §43-2330.1, in the resentencing of Klimas after the rehearing of his case resulted in a deprivation of due process which justifies the granting of habeas corpus relief. *Klimas* v. *Mabry, supra,* 599 F. 2d at 847-848.

In support of that statement, the Court of Appeals purported to find that the Arkansas statutes involved *require* that a recidivist defendant be re-sentenced by a jury, upon a finding that an error in sentencing was made.

Petitioner contends, first, that the issue of whether the Arkansas statute requires such a hearing is a matter of state law, not reviewable in habeas corpus proceedings. This Court, and other Courts of Appeals, have supported petitioner's position.

In *Gryger* v. *Burke,* 334 U.S. 728 (1948), a Pennsylvania trial judge allegedly misconstrued the habitual offender statute then in effect, and, believing he had no other choice, sentenced the defendant to imprisonment for life. In refusing to rule on the constitutionality of the trial judge's act, Mr. Justice Jackson, speaking for the majority of the Court, stated:

> It is clear that the trial judge, in view of the defendant's long criminal record, considered he had a duty to impose the life sentence . . . But there is nothing to indicate that he felt constrained to impose the penalty except as the facts before him warranted it. And in any event, it is for the Pennsylvania courts to say under its law what duty or discretion the Court may have had. Nothing in the record impeaches the farmers and temperateness with which the trial judge approached his task. His action has been affirmed by the highest court of the Commonwealth. *We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error* of the state law, if one occurred, as a denial of due process; otherwise,

> every erroneous decision by a state court on state law would come here as a federal constitutional question. 334 U.S. at 731 (Emphasis supplied.)

In *Sturm* v. *California Adult Authority,* 395 F. 2d 446 (9th Cir., 1968), the Court of Appeals for the Ninth Circuit examined a California statute to determine the amount of prison time an inmate would serve, within the limits of an indeterminate sentence set by the trial court. Petitioner therein asserted that, by re-assessing his sentence, the Adult Authority had acted outside the scope of its statutory authority. The Court of Appeals stated, in determining that no constitutional issue was raised:

> The California courts have clearly recognized the statutory authorization for the Adult Authority to redetermine a sentence; *this Court has previously stated that a state court's interpretation of its statute does not raise a federal question.* In re *Costello,* 262 F. 2d 214 (9th Cir. 1958), 395 F. 2d at 448.

In *McGarry* v. *Fogliani,* 370 F. 2d 41 (9th Cir. 1966), the Court of Appeals held that the question of whether a state habitual offender statute violated a right to trial by jury as allowed in the State Constitution, did not state a constitutional question reviewable by Federal habeas corpus proceedings. The Court of Appeals relied in part on *Gryger* v. *Burke, supra,* to reach its decision. 370 F. 2d at 43, n. 2.

In this per curiam opinion, the Court of Appeals stated:

> He (petitioner) claims that the statute violates Article I & 3 of the Nevada Constitution, which guarantees the right to trial by Jury, and also the Sixth and Fourteenth Amendments to the Constitution of the United States, particularly

> the Sixth Amendment guarantee of jury trial. [This] contention, being purely a question of state law, is not open to him in federal habeas corpus. 370 F. 2d at 43.

In *Wood* v. *Wilson,* 385 F. Supp. 1055 (W.D. Okla. 1974), petitioner asserted that the action taken by the Oklahoma Court of Criminal Appeals, modifying the findings of the trial court from murder to manslaughter, deprived petitioner of his right to a jury trial on the charge of manslaughter. The District Court held, in construing the Oklahoma statute giving the Court of Criminal Appeals the power to modify the judgments of trial courts, that:

> The petitioner's argument that he has been denied a jury trial on a charge of Manslaughter, First Degree, is fallacious. He was tried by a jury. The jury found him guilty of every element of the offense of Manslaughter. [The jury, however, found him guilty of murder.] The Court of Appeals ruled . . . that there was no evidence of [premeditation] . . . The suggestion of the petition that the Court of Appeals has no authority to modify the judgment . . . does not raise a federal constitutional question. It is a matter of interpretation of state law and properly for the determination of state courts. A federal court must accept the interpretation of state law unless it is inconsistent with the fundamental principles of liberty and justice. See, *Francis* v. *Rodriguez,* 371 F. 2d 827 (CA 10 1967); *Ratley* v. *Crouse,* 365 F. 2d 320 (CA 10 1966); *Mesmer* v. *Raines,* 298 F. 2d 718 (CA 10 1961).

In *Willeford* v. *Estelle,* 538 F. 2d 1194 (5th Cir. 1976), the Texas Court of Criminal Appeals *sua sponte* found that the petitioner had been erroneously sentenced under the Texas

general statute relating to habitual offenders. The court reassessed the sentence to read "for not less than ten years nor more than life," instead of life in prison, as had been assessed under the general statute. Willeford asserted that, because the trial judge could have sentenced him to a set term of years, but for his mistake, the action of the Texas Court of Criminal Appeals deprived him of due process and equal protection. The Court of Appeals, in sustaining the action of the Texas Court, stated:

> The extent to which the Texas Court of Criminal Appeals may modify or reform an erroneously imposed sentence is a matter of state law. Although couched in terms of equal protection and due process, the burden of petitioner's complaint in this case reduces to a challenge to the authority of the Texas Court of Criminal Appeals as exercised in the reformed sentence imposed upon petition. This issue is not of federal constitutional proportions. The Texas Court's actions controvene neither the constitution, laws nor treaties of the United States.

Petitioner notes that in *Willeford,* above, the Court of Appeals relied in part on *Rose* v. *Hodges,* 423 U.S. 19 (1975). In that case, two Tennessee prisoners were sentenced by a jury to death, shortly before this Court's holding in *Furman* v. *Georgia,* 408 U.S. 238 (1972). The Tennessee Court of Criminal Appeals directed that the case be remanded to the trial court on the issue of sentence. *Hodges* v. *State,* 491 S.W. 2d 624 (1972). In an effort to avoid such remand, the Governor of Tennessee commuted petitioner's death sentence to ninety-nine years' imprisonment. Contending that said commutation was illegal and in violation of due process, petitioner sued out a writ of habeas corpus in the Federal District Court for the Western District of

Tennessee. That court dismissed for failure to exhaust state remedies. The Sixth Circuit Court of Appeals reversed, in an order remanding the case to the trial court for re-sentencing. This Court reversed the Court of Appeals' holding that no federal question had been presented. This Court stated:

> Respondents urge, in support of the result reached by the Court of Appeals for the Fifth Circuit, that their Fourteenth and Sixth Amendment rights to a jury trial have been infringed by the Tennessee proceedings. We reject these contentions. *A jury had already determined their guilt and sentenced them to death.* The Governor commuted these sentences to a term of 99 years after this Court's decision in *Furman* v. *Georgia* (supra). *Neither Furman nor any other holding by this Court requires that following such commutation the defendant shall be entitled to have his sentence determined even by a jury.* If Tennessee chooses to allow the Governor to reduce a death penalty to a term of years without resorting to further judicial proceedings, the United States Constitution affords no impediment to that choice. *Dreyer* v. *Illinois,* 187 U.S. 71, 47 L. Ed. 79, 23 S. Ct. 28 (1902); Cf. *Schick* v. *Reed,* 419 U.S. 256, 42 L. Ed. 2d 430, 95 S. Ct. 379 (1974).

In its opinion below in the case at bar, the Court of Appeals purported to distinguish *Rose, supra,* by stating:

> The State, citing *Rose* v. *Hodges* [supra], argues that since the Arkansas Supreme Court modified Klimas' sentence without affording him a redetermination by jury of the habitual criminal charge, we must assume that such action was authorized by state law. We do not believe that *Rose* stands for so broad a proposition. In *Rose,* whether or not the sentences imposed upon respondents were subject to

> commutation by the Governor of Tennessee was a disputed question of state law, resolved in favor of commutation by the Tennessee courts. We do not believe that *Rose* stands for the proposition that where rights under the state law are clear, the denial of those rights to a particular accused by the state courts is insulated from federal habeas corpus review. 599 F. 2d at 849.

In so stating the Court of Appeals acted in clear defiance of the overwhelming Arkansas law, cited in Section A hereof, which gives the Arkansas Supreme Court the power to do exactly as it did in this case. In sum, respondent's right to a re-assessment of his sentence by a jury *is not clear* — it is non-existent. As pointed out by Judge Henley in his dissent in the denial of a rehearing in this case, no procedure exists in Arkansas for such jury re-assessment of sentence. This fact alone, petitioner contends, is sufficient to show that the intention of the Arkansas Legislature was not to afford petitioner a re-determination by jury, of his sentence.

Further, the Court of Appeals has specifically ignored the language of this Court in *Rose, supra,* that nothing in the Constitution nor the holdings of this Court requires that a sentence be re-determined by jury. 423 U.S. at 22. In sum, respondent herein has neither a state nor federal right to the relief suggested by the Court of Appeals in this case.

It is noted that the Court of Appeals herein has failed to distinguish its own law, as well. In *Wolfe* v. *Nash,* 313 F. 2d 393 (8th Cir. 1963), the Court of Appeals stated:

> The argument that, because certain evidence relating to the prior felony convictions of Wolfe alleged in the infor-

mation was heard by the State trial judge in the presence of the jury during the State's case in chief, the trial became so unfair as to violate due process, is impersuasive. The theory is that because the State Habitual Criminal Act provides (as it did not formerly), that evidence of prior convictions shall be heard by the State trial judge out of the hearing of the jury and because this state statutory command was not strictly complied with in the trial of Wolfe, the due process clause of the Fourteenth Amendment of the Federal Constitution entitled Wolfe to have the United States District Court set aside this conviction and require the Circuit Court of Pike County to retry him. *How and in what way proof of prior convictions shall be made under the State Habitual Criminal statute, and what effect a deviation from the requirements of the statute would have, we regard as purely a local legal problem and of no national concern whatsoever. The due process clause of the Fourteenth Amendment does not enable us to review errors of state law. Buchalter* v. *New York*, 319 U.S. 427, 431, 63 S. Ct. 1129, 87 L. Ed. 1492, 313 F. 2d at 400. (Emphasis supplied)

In its opinion in the case at bar, the Court of Appeals stated that Klimas' supposed right to a jury trial arises out of state law. However, the Court of Appeals chose to ignore the state law which allows the Arkansas Supreme Court to re-assess sentences. In its opinion, the Court of Appeals did not distinguish or overrule the language of *Wolfe, supra,* to the effect that any deviation from state sentencing practices is purely a state concern.

C. THE ACTION OF THE ARKANSAS SUPREME COURT, WAS AT MOST, HARMLESS ERROR.

This Court put forth its "harmless error" rule in *Fahy* v. *Connecticut,* 375 U.S. 85, 86-87 (1963), when it stated: "The question is whether there is a reasonable possibility that the evidence contributed to the conviction." It further delineated the rule in *Chapman* v. *California,* 386 U.S. 18 (1967), when it stated that ". . .before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24.

The Court applied this rule in the subsequent case of *Harrington* v. *California,* 395 U.S. 250 (1969). There, the petitioner sought reversal of his conviction based upon the introduction of co-defendant's confessions contrary to the Confrontation Clause of the Sixth Amendment as set forth in *Bruton* v. *United States,* 391 U.S. 123 (1968). 395 U.S. at 252. In affirming Harrington's conviction, the Court held that this constitutional violation was "harmless error" in light of the fact that the evidence against him was "overwhelming", discounting the alleged *Bruton* violation. 395 U.S. 253-254.

The Eighth Circuit Court had occasion to construe *Harrington* in a case similar to the one at bar, *Gerberding* v. *Swenson,* 435 F. 2d 368 (8th Cir. 1970), cert. denied, 403 U.S. 906 (1971). There, the appellant had been convicted under the Missouri second offender act, which, at that time, made a life sentence mandatory upon a *second* felony conviction. At the trial, the state presented evidence of three (3) prior felony convictions, one of which was unconstitutional pursuant to *Burgett* v. *Texas,* 389 U.S. 109 (1967).

In denying a Writ of Habeas Corpus, the court stated:

Under the factual situation of the instant case, where two

other valid prior felony convictions were proved by the jury, it clearly appears that Gerberding was not prejudiced by the use of the now constitutionally infirm earlier conviction. The two admittedly valid prior convictions were more than sufficient to call for application of the enhanced penalty. Here, unlike Beto [v. *Stacks*, 408 F. 2d 313 (5th Cir. 1969)] and Tucker [v. *Craven*, 421 F. 2d 139 (9th Cir. 1970)] the predicate still existed for application of the enhanced penalty. As to whether or not the use of the invalid conviction was so inherently prejudicial as to affect the substantive guilt-finding process, this case would appear to be a proper one for the application of the "harmless error" rule. See *Gilday* v. *Scafati, 428 F. 2d 1027 (1st Cir.), cert. denied, 400 U.S. 926, 91 S. Ct. 188, 27 L. Ed. 2d 186 (1970) (holding that the admission of three invalid prior convictions for the purpose of impeachment was harmless error); Harrington* v. *California, 395 U.S. 250, 89 S.Ct. 1726, 23 L. Ed. 2d 284 (1969).*"
434 F.2d at 371.

Here, as in Gerberding, even when the convictions which were impermissibly submitted to the jury are *removed*, there were still *six valid prior felony convictions* before them, *three* (3) *more* than the *threshold necessary* for imposition of the maximum enhancement. See, Ark. Stat. Ann. §43-2328 (3) (Supp. 1975).

That these convictions were before the jury cannot be denied, for Ark. Stat. Ann. §43-2330.1(3) (Supp. 1975), states:"

> (3) The jury shall again retire, and if it is found that the prior conviction(s) exists, or *if the defendant admits such previous conviction(s)*, then the prior conviction(s) shall be considered in fixing the punishment for the current offense

> for which the defendant has been convicted in accordance with Section I [§43-2328] hereof. [Acts 1967, No. 639, §2, p.1174.]"

While Klimas did object to the introduction of the seven prior Missouri convictions, it is undisputed that he *did not deny, nor object to any* of the six (6) prior Arkansas felony convictions, neither at the trial, appellate, or post-conviction level. *Klimas* v. *Mabry*, supra, 599 F.2d at 845, 846.

In deciding that the action of the Arkansas Supreme Court Court, in reducing Klimas's sentence to the minimum for one with four or more felony convictions, was not a case of harmless error, the Eighth Circuit apparently chose to disregard the standards of *Harrington & Gerberding*. The Court instead founded its decision upon the fact that Arkansas's habitual criminal act had been modified in the interim between Klimas's trial and the date of the opinion of the Arkansas Supreme Court. 599 F.2d at 849-850. The Eighth Circuit noted that, while Klimas had had *six* valid prior convictions under the law at the time of the offense and his trial, that by the time the appeal was rendered the law was changed so as to consider burglary and larceny convictions as but one prior conviction. 599 F.2d at 850. The Eighth Circuit concluded that it could not say that the action of the Arkansas Supreme Court was harless since on retrial, it was "unclear" as to whether the old law (that in effect at the time of the offense) or the new (that currently in effect) would govern.

It is most clear, however, that if a retrial were ordered, Klimas would be governed by the law in effect at the time of his first trial, Ark. Stat. Ann. §43-2328 (Supp. 1975). Arkansas's new criminal code went into effect January 1, 1976, over a year after Klimas committed the substantive for which he was con-

victed and some six months after his trial and conviction.

Application of the Code is governed by Ark. Stat. Ann. §41-102 (Repl. 1977), noted by the Eighth Circuit at 599 F.2d 850 n.14. Section 41-102 (1), (3)&(4) of the code state:

> (1) The provisions of this Code [§§41-101 41-3110] shall govern the prosecution for any offense defined by this Code and committed after the effective date [January 1, 1976] hereof.". . .
>
> "(3) The provisions of this Code do not apply to the prosecution for any offense committed prior to the effective date of this Code. Such an offense shall be construed and punished in accordance with the law existing at the time of the commission of the offense.
>
> (4) A defendant in a criminal prosecution for an offense committed prior to the effective date of this Code may elect to have the construction and application of any defense to such prosecution governed by the provisions of this Code. Such election shall be made by motion to the court which is to conduct the trial. The motion shall be timely filed but not later than ten (10) days before the date set for the trial of the case, except that the court for a good cause shown may entertain such motion at a later time."

While the habitual criminal act is not an "offense" within the criminal code but authorizes more severe punishment, see *Finch* v. *State*, 262 Ark. 313, 556 S.W.2d 434 (1977), it is still inexorably tied to the substantive offense with which the individual is primarily charged. Thus, it is substantive rather than procedural law and the Arkansas Supreme Court has refused to

retroactively apply the criminal code habitual offender act to persons charged with crimes occurring before the effective date of the criminal code. See *Reeves* v. *State*, 263 Ark. 227, 231, 564 S.W.2d 503 (1978); also see, gen. *Shepard* v. *Taylor*, 556 F.2d 648, 652, 653 (2nd Cir. 1977); see, gen., *Patrick* v. *Lineberger*, 265 Ark. 334, 576 S.W.2d 191 (1979).

Nor could it be contended that Klimas could invoke the "new" habitual offender statute as a "defense", pursuant to Ark. Stat. Ann. §41-102(4) (Repl. 1977). "Defenses" under the new criminal code are defined in Ark. Stat. Ann. §41-110(3) (Repl. 1977):

> "(3)The issue of the existence of a defense need not be submitted to the jury unless evidence is admitted supporting the defense. If the issue of the existence of a defense is submitted to the jury, the court shall charge that any reasonable doubt on the issue requires that the defendant be acquitted. A defense is any matter:
>
> (a)so designated by a section of this Code [§§41-101—41-3110] ; or
>
> (b) so designated by a statute not a part of this Code; or
>
> (c)involving an excuse or justification peculiarly within the knowledge of the defendant on which he can fairly be required to introduce supporting evidence."

Further, the Arkansas Supreme Court has limited defenses to that defined by §41-110(3). See *Campbell* v. *State*, 265 Ark. 77, 83, 576 S.W.2d 938 (1979) and *Patrick* v. *Lineberger*, *supra*.

Thus, it can readily be seen that not only did the Eighth Circuit refuse to follow the standard espoused by this Court in determining whether the alleged error was harmless, its own

prior holding in *Gerberding* v. *Swenson, supra,* but also that the basis for its finding that the alleged error was not harmless was without foundation.

CONCLUSION

For the reasons set out, petitioner prays that this Honorable Court grant this Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. _____

JAMES MABRY, COMMISSIONER
ARKANSAS DEPARTMENT OF CORRECTION ..... *Petitioner*

vs.

FRANCIS EDWARD KLIMAS ..... *Respondent*

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 78-1663

Francis Edward Klimas,

Appellant,

v.

James Mabry, Commissioner, Arkansas Department of Corrections,

Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: February 12, 1979

Filed: May 30, 1979

Before HEANEY and McMILLIAN, Circuit Judges, and SCHATZ,* District Judge.

HEANEY, Circuit Judge.

Francis Edward Klimas, an Arkansas State prisoner, appeals from the order of the District Court dismissing his petition for a writ of habeas corpus.[1] On appeal, Klimas contends that the writ should have been granted because his cross-

[1]Klimas's petition was brought under 28 U.S.C. §2254.

*ALBERT G. SCHATZ, United States District Judge, for the District of Nebraska, sitting by designation.

examination of a key prosecution witness at his state trial was impermissibly restricted, and because records of seven Missouri convictions, which were silent as to Klimas's representation by counsel, were considered by the jury in the enhancement of his sentence under the Arkansas Habitual Criminal Act, Ark. Stat. Ann. §43-2328. We reverse and remand.

Klimas was convicted of burglary and grand larceny, in violation of Ark. Stat. Ann. §§41-1003 and 41-3907 (repealed 1976), in Jefferson County Circuit Court on April 23, 1975.[2] After the verdicts of guilty were returned, the second part of the information, charging Klimas with being a habitual criminal under Ark. Stat. Ann. §43-2328,[3] was read to the jury. The

[2]Evidence introduced at Klimas's trial indicated that Klimas and an accomplice, Arlie Weeks, burglarized the Dixie Wood Preserving Company plant near Pine Bluff, Arkansas, and stole a check made out to the Potlatch Corporation, ten walkie-talkie radios and coins from two soft-drink dispensing machines. Weeks testified that the men obtained approximately $58.00 from the machines, which they split between them.

[3]Ark. Stat. Ann. §43-2328 provides:

Second or subsequent convictions — Sentence. — Any person convicted of an offense, which is punishable by imprisonment in the penitentiary, who shall subsequently be convicted of another such offense, shall be punished as follows:

(1) If the second offense is such that, upon a first conviction, the offender could be punished by imprisonment for a term less than his natural life, then the sentence to imprisonment shall be for a definite term not less than one (1) year more than the minimum sentence provided by law for a first conviction of the offense for which the defendant is being tried, and not more than the maximum sentence provided by law for this offense, unless the maximum sentence is less than the minimum sentence plus one (1) year, in which case the longer term shall govern.

(2) If the third offense is such that, upon a first conviction, the offender could be punished by imprisonment for a term less than his natural life, then the person shall be sentenced to imprisonment for a determinate term not less than three (3) years more than the minimum sentence provided by law for a first conviction of the offense for which the defendant is being tried, and not more than the maximum sentence provided by law for the offense, unless the maximum sentence is less than the minimum sentence plus three (3) years, in which case the longer term shall govern.

prosecution then offered into evidence certified copies of records from the Department of Correction, Missouri State Penitentiary, which indicated that Klimas had been previously convicted of seven felonies in Missouri.[4] The defense objected to the introduction of this evidence on the ground that the records were silent as to whether Klimas had been represented by counsel. This objection was overruled. The prosecution also introduced certified copies of records from the Arkansas State Penitentiary, which indicated that Klimas had pled guilty to three burglary-grand larceny transactions, occurring on February 12, 21 and 26 of 1972, for which he received three concurrent, five-year sentences.[5] No objection to the introduction of this evidence was made.

Arguments on the habitual criminal charge were made to the jury by both the prosecution and the defense. The jury was

(3) If the fourth or subsequent offense is such that, upon a first conviction, the offender could be punished by imprisonment for a term less than his natural life, then the person shall be sentenced to imprisonment for the fourth or subsequent offense for a determinate term not less than the maximum sentence provided by law for a first conviction of the offense for which the defendant is being tried, and not more than one and one-half (1½) times the maximum sentence provided by law for a first conviction; provided, that any person convicted of a fourth or subsequent offense shall be sentenced to imprisonment for not less than five (5) years.

[4]These convictions, dating back to 1951, were as follows: grand larceny, sentence — two years, time served — one year; burglary and stealing, sentence — two consecutive two-year terms, time served — two and one-half years; three counts of stealing, sentence — three four-year concurrent terms, time served — more than two years; two counts of robbery, sentence — two concurrent eight-year terms, time served — four and one-half years.

[5]The February 12, 1972, crime involved theft of two television sets, some clothing and a shotgun from a house after entering through an unlocked garage door. The February 21, 1972, crime involved the theft of cigarettes, an undisclosed amount of money and personal property from an open truck. The February 26, 1972, crime involved the theft of approximately $150.00 from a tavern's vending machines.

then instructed and sent to deliberate with four verdict forms. The first form provided that if the jury found Klimas guilty of having been convicted of no prior felony offense, his punishment should be fixed at not less than one nor more than twenty-one years for grand larceny, and not less than two nor more than twenty-one years for burglary. The second form provided that if the jury found him guilty of having been convicted of one prior felony offense, his punishment should be fixed at not less than two nor more than twenty-one years for grand larceny, and not less than three nor more than twenty-one years for burglary. The third form provided that if he was found guilty of having been convicted of two prior felony offenses, his punishment for grand larceny should be fixed at not less than four nor more than twenty-one years for grand larceny, and not less than five or more than twenty-one years for burglary. The fourth form provided that if he was found guilty of having been convicted of three prior felony offenses, his punishment should be fixed at not less than twenty-one nor more than thirty-one and one-half years for grand larceny, and the same for the crime of burglary. The jury found that Klimas had been convicted of three prior felonies and fixed his sentence at thirty-one and one-half years for grand larceny, and thirty-one and one-half years for burglary. The trial judge ordered that Klimas serve these sentences consecutively.

Klimas appealed to the Arkansas Supreme Court, raising, among other grounds, the two grounds for reversal urged here. *Klimas* v. *State*, 259 Ark. 301, 534 S.W. 2d 202 (1976), *cert. denied*, 429 U.S. 846 (1976). The Arkansas Supreme Court held that since the records of Klimas's Missouri convictions were silent concerning his representation by counsel, they were inadmissible in the sentencing enhancement proceeding under *Burgett* v. *Texas*, 389 U.S. 109 (1967). The Court reversed the judgment

and remanded the case for a new trial unless the Arkansas Attorney General, within seventeen calendar days, accepted a reduction of Klimas's sentence to three years, the minimum sentence which he could have received for the burglary and grand larceny charges. 534 S.W. 2d at 207. On rehearing, the Court modified its original order and imposed a sentence of forty-two years, twenty-one years for each offense. The Court reasoned that since the six prior Arkansas convictions (three burglary-larceny transactions) were unchallenged by Klimas in the trial court, the minimum sentence which Klimas could have received would have been twenty-one years, making a total of forty-two years for the two offenses. The Court concluded that any possible prejudice to Klimas would be removed by reduction of his sentence to forty-two years. *Id.* Klimas's other grounds for the reversal of his conviction were rejected. The State subsequently agreed to this reduction, sentencing Klimas, in effect, to forty-two years imprisonment for the commission of four petty burglaries, three of which occurred within a fourteen-day period and for which he had previously served one five-year sentence.

Klimas then brought this habeas corpus action in federal District Court, raising the same issues which were raised in his state appeal and which he raises now. A hearing was held in the District Court on May 10, 1978. At that hearing, the District Court expressed concern that Klimas had received such a severe sentence for this series of petty crimes. [6] The court believed that

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[6]The District Court stated:

THE COURT: I wish I could find some reason to give this petition consideration. It seems to me like it's almost a tentative action taken by the state court on the charge of this nature — forty-two years under Arkansas law. But this Court has no right to disturb the decision of the state court.

• • • •

THE COURT: Well, I simply don't know if this Court can do anything

it was without jurisdiction, however, both because Klimas's petition failed to sufficiently allege a violation of a constitutional right and because the United States Supreme Court denied certiorari in this appeal from the decision of the Arkansas Supreme Court. The District Court dismissed Klimas's petition for lack of jurisdiction, and he now appeals.

To the extent that the District Court believed that it was without jurisdiction to consider Klimas's petition because of the

about it on the charges you bring. The record on which you rely is that the state court sentenced you under the provisions of law. The Supreme Court of Arkansas heard — was in the process of remanding it for you to have a reduction to three years. What was the charge that you were being tried for here?

[MR. KLIMAS]: Burglary and larceny, your Honor.

THE COURT: Were all cases that you've been involved in burglary and larceny?

[MR. KLIMAS]: Yes, sir.

THE COURT: And you just contend that the Court was in error in presenting it to the jury wherein you were convicted. Unless there's some showing of [a] constitutional right being violated, this Court just doesn't have any jurisdiction over the matter. • • •

Then you say that the Court was in error contrary to federal law in not reversing the original conviction, with orders to grant a new trial. Well, what you say here is the Supreme Court of Arkansas was wrong, when on a rehearing it modified its previous decision. And that certainly is not a constitutional question here.

I have a great deal of feeling about this because of the sentence. I know the state court probably was trying to carry out the state law and I would suspect that the Supreme Court had in mind that that was a terrible sentence to impose upon you, and it was looking for some reason to do something about it. • • •

I wish I could suggest some action for you to take to try to do something about this rather severe sentence under Arkansas law. • • •

• • • •

THE COURT: Well, I sure would make a pitch before the Parole Board, is about all I can suggest to you. I am sorry I can't do anything for you under the circumstances.

An order will be entered accordingly dismissing the petition for lack of jurisdiction. I hope you will find another reason that you can get some relief anyway.

[MR. KLIMAS]: Thank you, your Honor.

Transcript of Proceedings before the Honorable Oren Harris, United States Senior District Judge, May 10, 1978, at 69.

United States Supreme Court's denial of certiorari, it was in error. If, in exhausting state remedies, a state prisoner unsuccessfully seeks Supreme Court review, no weight is to be given to this denial when considering the prisoner's later petition for habeas corpus. See 28 U.S.C. §§ 2244(c); *Brown* v. *Allen*, 344 U.S. 443, 488-497 (1953); 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* par. 4264 at 631 (1978).

We, therefore, turn to the more difficult question presented by this petition: whether Klimas's pro se petition, liberally construed, sufficiently states the deprivation of a constitutional right which would justify the granting of federal habeas corpus relief.[7] See 28 U.S.C. § 2254; *Louis Serna* v. *Donald Wyrick*, No. 78-1385, slip op. at 2-3 (8th Cir., Jan. 31, 1979); *DeBerry* v. *Wolff*, 513 F. 2d 1336, 1338 (8th Cir. 1975).

We agree with the District Court that any error which the state trial court committed in restricting the cross-examination of Arlie Weeks, Klimas's accomplice and the prosecution's principal witness against him, did not rise to the level of the deprivation of a constitutional right. Klimas's counsel, in an apparent attempt to show that Weeks expected assistance from the

[7]The State conceded below that klimas has exhausted his state remedies, and no claim to the contrary is made in the briefs before us. In any event, the federal rule that a state prisoner's state-court remedies must be exhausted before federal habeas corpus relief will lie is based on principles of comity, rather than the absence of federal power. *Cage* v. *Auger*, 514 F. 2d 1w31, 1232 (8th Cir. 1975); *Smith* v. *Wolff*, 506 F. 2d 556 (8th Cir. 1974). Where it is clear that the state courts have had an opportunity to correct the constitutional error, there has been a sufficient vindication of the state's interests and the federal courts should proceed to entertain the §2254 proceeding. *Cage* v. *Auger*, *supra*, at 1232-1233. We are satisfied that the substance of Klimas's claims, concerning the restriction of the cross-examination of his accomplice and the imposition of his forty-two year sentence by the Arkansas Supreme Court, have been fairly considered by the Arkansas courts and that no purpose would be served by their presentation once again to the state courts. *See*, *Wolfs* v. *Britton*, 509 F. 2d 304, 308 (8th Cir. 1975).

prosecuting attorney in obtaining parole from his current incarceration in exchange for his testimony, asked Weeks whether he was aware that the recommendation of the prosecuting attorney is required before parole is granted in Arkansas. The prosecutor objected to the question; but before the court ruled on the objection, Weeks answered in the negative. The court then sustained the objection. Failure to allow effective cross-examination aimed at eliciting the bias of a prosecution witness can rise to the level of a constitutional violation. See *Davis* v. *Alaska*, 415 U.S. 308 (1974). Although the objection here was probably erroneously sustained, since Weeks did answer the question prior to the court's ruling and since no further attempts were made by Klimas's counsel to elicit Weeks' possible bias, we cannot say that this error by the state trial court constituted a violation of Klimas's constitutional rights which would justify the granting of habeas corpus relief.

We find, however, that, under the particular facts of this case, the failure of the Arkansas Supreme Court to follow the sentencing procedure required by the Arkansas Habitual Criminal Act, Ark. Stat. Ann. § 41-1005 or § 43-2330.1[8] in the resentencing of Klimas after the rehearing of his case resulted in a deprivation of due process which justifies the granting of habeas corpus relief.

[8]At the time of Klimas's trial on April 23, 1975, trial of habitual criminal charges was governed by Ark. Stat. Ann. §43-2330.1. An extensive revision of the Arkansas Criminal Code was passed by the Arkansas legislature in 1975 and became effective on January 1, 1976. Under the new Criminal Code, the procedure for imposing an extended sentence on a person found to be a habitual offender is set forth in Ark. Stat. Ann. §41-1005. This section is taken, almost verbatim, from the previous section. Although the new Criminal Code did not explicitly repeal §43-2330.1, the "Compiler's Notes" following §43-2230.1 state that "[t]his section, or portions thereof, may have been impliedly repealed by the Criminal Code of 1976." *See*, Notes by the Arkansas Statute Revision Commission, 4A Arkansas Statutes 1947 Annotated, at p. 316.

Generally, the failure of a state court to comply with the provisions of state law in its criminal trials is purely a matter of local concern and is not reviewable by federal courts under the due process clause of the federal Constitution. See *Buchalter* v. *New York*, 319 U.S. 427, 429-430 (1943); *Billy Ray Cox* v. *Terrell Don Hutto*, No. 78-1482, slip op. at 2 (8th Cir., Jan. 16, 1979). The failure of a state to afford a particular defendant the benefit of established procedures under state law may, however, result in a denial of due process when the error made by the state court renders the state proceedings so fundamentally unfair or so fundamentally deficient that they are inconsistent with the rudimentary demands of fair procedure. *Hill* v. *United States*, 368 U.S. 424, 428 (1962); *DeBerry* v. *Wolff*, *supra* at 1338; *Shirley* v. *State of N.C.*, 528 F. 2d 819, 822 (4th Cir. 1975).

Under the Arkansas Habitual Criminal Act, an individual who is charged with being a habitual criminal[9] is tried for that offense after a verdict of guilty has been returned for the primary felony charge on which he has just been tried. Ark. Stat. Ann. §§ 41-1005, 43-2330.1. Evidence pertaining to the defendant's previous felony convictions is submitted to the jury and the defendant has the right to controvert such evidence or to submit other evidence in his support. *Id.* The jury must then retire; and only upon its finding that the defendant has been convicted of prior felonies may a particular enhanced sentence be imposed. *Id.* Throughout this procedure, the State bears the burden of proving the prior convictions of the defendant, *McConahay* v. *State*, 257 Ark. 328, 516 S.W. 2d 887, 889 (1974), and the weighing of the evidence and the ultimate factual fin-

[9]The definition of a habitual offender and the terms of imprisonment which may be imposed upon habitual offenders are found in Ark. Stat. Ann. §41-1001 (effective January 1, 1976). The prior provision, which was in effect at the time of Klimas's trial, is found in Ark. Stat. Ann. §43-2328.

ding that the defendant is a habitual criminal are for the jury alone. *Id.*

Where a state has provided, by statute, that a habitual criminal charge is to be tried to a jury, we do not believe that the state can abrogate that right in a particular case without violating the notions of fundamental fairness inherent in the due process clause. Where a right to trial by jury has been established under state law, the state cannot deny a particular accused that right without violating even the minimal standards of the due process clause. See *Irvin* v. *Dowd*, 366 U.S. 717 (1961); *Berrier* v. *Egeler*, 583 F. 2d 515, 522 (6th Cir. 1978); *Wolfs* v. *Britton*, 509 F. 2d 304 (8th Cir. 1975); *Shirley* v. *State of N.C., supra; Braley* v. *Gladden*, 403 F. 2d 858, 860-861 (9th Cir. 1968). While a habitual criminal proceeding is commonly thought of as a sentence-enhancement proceeding, rather than as a trial for a substantive offense, we believe that the highly penal nature of the Arkansas Habitual Criminal Act requires that the statutory requirements for conviction under that Act be strictly construed. See *Billy Ray Cox* v. *Terrell Don Hutto, supra; Parker* v. *State*, 258 Ark. 880, 529 S.W. 2d 860, 863 (1975); *McConahay* v. *State, supra*, 516 S.W. 2d at 889; *Higgens* v. *State*, 235 Ark. 153, 357 S.W. 2d 499, 501 (1962).

After the Arkansas Supreme Court found that the evidence of Klimas's seven Missouri convictions were erroneously submitted to the jury, the Court did not remand his case for retrial on the habitual criminal charge. Instead, the court reimposed a sentence under the Habitual Criminal Act on the theory that the evidence of his prior Arkansas convictions, which was also submitted to the jury, could have supported the jury's finding that he had three prior convictions and, thus, was subject to the harshest penalty available under the habitual criminal law

which was in effect at the time of Klimas's trial. It is impossible to tell from the jury's verdict, however, *which* three prior offenses were used by the jury to support its conviction on the habitual criminal charge. There is no way we can assume that the jury found Klimas to be guilty of having been convicted of the prior Arkansas offenses since any three of the Missouri convictions alone would have supported the findings of the jury and the sentence which is imposed.[10]

The State, citing *Rose* v. *Hodges*, 423 U.S. 19 (1975), argues that since the Arkansas Supreme Court modified Klimas's sentence without affording him a redetermination by jury of the habitual criminal charge, we must assume that such an action was authorized by state law. We do not believe that *Rose* stands for so broad a proposition. In *Rose*, whether or not the sentences imposed upon respondents were subject to commutation by the Governor of Tennessee was a disputed question of state law, resolved in favor of commutation by the Tennessee courts. We do not believe that *Rose* stands for the proposition that where rights under state law are clear, the denial of those rights to a particular accused by the state courts is insulated from federal habeas corpus review. As stated by the Ninth Circuit in *Braley* v. *Gladden, supra*:

> Emphasizing that the jury trial in this case arose solely from * * * the Oregon constitution, the appellee insists that the interpretation by Oregon courts as to that which is required by Oregon's constitution is firmly controlling. * * *

[10]This case is, therefore, distinguished from those cases where all f the prior convictions submitted to the jury were necessary to support the jury's findings. *See, e.g., Wilburn* v. *State*, 253 Ark. 608, 487 S.W. 2d 600 (1972) (evidence of two prior felony convictions submitted to the jury; defendant sentenced by the jury as a "third offender").

> Unquestionably, the state courts should have the primary responsibility for determining the application of the state constitutions; however, this principle does not diminish our responsibility to insure that state constitutional interpretations are consistent with the federal Constitution.

Id. at 860. *See also Ellingburg* v. *Lockhart*, 397 F. Supp. 771, 776 (E.D. Ark. 1975).

The question which remains is whether the state court's failure to afford Klimas a redetermination of the habitual criminal charge by jury was, in any event, harmless error since Klimas did not challenge the existence of the Arkansas convictions at the state trial or on appeal.[11] The Arkansas Supreme Court held that since, in view of the unchallenged Arkansas convictions, the minimum sentence which Klimas could have received under § 43-2328(3) would have been twenty-one years on each charge, the reduction of his sentence from sixty-three years to forty-two years would remove any possible prejudice to him.

Retrial of a criminal defendant on a habitual criminal charge may be a futile gesture where evidence of convictions, which was properly submitted to the jury, is unchallenged by the defendant. *See, e.g., Roach* v. *State*, 255 Ark. 773, 503 S.W. 2d 467, 471 (1973).[12] In this case, however, Klimas's right to a

[11]The fact that an accused does not submit evidence contradicting that submitted by the prosecution does not, of course, eliminate the accused's right to a jury trial. Where a statutory right to trial by jury exists, that right must be honored, "regardless of the heinousness of the crime charged [or] the apparent guilt of the offender • • •." *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961). *See also, Braley* v. *Gladden*, 403 F. 2d 858, 860-861 (9th Cir. 1968).

[12]In *Billy Ray Cox* v. *Terrell Don Hutto*, No. 78-1482 (8th Cir., Jan. 16, 1979),

retrial of the habitual offender charge is of importance since the provisions of the Arkansas Habitual Criminal Act were changed between the time of his state court trial and the time of the modification of his sentence by the Arkansas Supreme Court. Under Ark. Stat. Ann. § 43-2328(3), in effect at the time of his trial, Klimas's six Arkansas convictions (three burglary-larceny transactions) would, as the Arkansas Supreme Court indicated, require a sentence of at least twenty-one years on each of his current charges. Under the new provisions of the Habitual Criminal Act, Ark. Stat. Ann. § 41-1001 (effective January 1, 1976), each of the Arkansas burglary-larceny transactions, of which Klimas had previously been convicted, would be considered only as a single felony conviction, giving him a total of three prior felony convictions. With this record, under the new law, he would appear to be subject to a sentence of not less than five, nor more than thirty, years on each of his current charges.[13]

we held that the failure of the state trial judge to inquire into Cox's knowledge of and consent to a stipulation of his prior convictions, filed by his counsel in a habitual criminal proceeding, deprived him of his constitutional rights. We remanded the case to the District Court for a determination of whether Cox sustained any prejudice from the defective stipulation of prior convictions. Such prejudice would be presumed unless the state could establish that it possessed evidence at the time of trial establishing the three prior convictions necessary to support Cox's sentence. Cox's right to a redetermination by jury of his habitual criminal conviction was not raised in that case and, thus, we did not address that issue.

[13]Ark. Stat. Ann. §41-1001 states:

Sentence to imprisonment for felony — Extended term for habitual offender. — (1) A defendant who is convicted of a felony and who has previously been convicted of more than one (1) but less than four (4) felonies, or who has been found guilty of more than one (1) but less than four (4) felonies, may be sentenced to an extended term of imprisonment as follows:

(a) not less than ten (10) years nor more than fifty (50) years, or life, if the conviction is of a class A felony;

(b) not less than five (5) years nor more than thirty (30) years, if the conviction is of a class B felony;

(c) not less than three (3) years nor more than fifteen (15) years, if the conviction is of a class C felony;

Since neither the briefs filed by the parties nor our questions at oral argument resolved whether the old or new law would govern a retrial of the habitual criminal charge and the penalty to be assessed thereunder,[14] we cannot say, as a matter of law,

(d) not exceeding seven (7) years, if the conviction is of a class D felony;

(e) upon conviction of an unclassified felony punishable by less than life imprisonment, not less than three (3) years more than the minimum sentence for the unclassified offense nor more than five (5) years more than the maximum sentence for the unclassified offense;

(f) upon conviction of an unclassified felony punishable by life imprisonment, not less than ten (10) years nor more than fifty (50) years, or life.

* * * *

(3) For the purpose of determining whether a defendant has previously been convicted or found guilty of two [2] or more felonies, a conviction or finding of guilt of burglary and of the felony that was the object of the burglary shall be considered a single felony conviction or finding of guilt. A conviction or finding of guilt of an offense that was a felony under the law in effect prior to the effective date [January 1, 1976] of this Code shall be considered a previous felony conviction or finding of guilt.

Under the new Arkansas Criminal Code, burglary is a class B felony, and larceny is a class B or C felony. *See,* Ark. Stat. Ann. §§41-2002, 41-2203.

Consideration of a burglary and the felony that was the object of the burglary as a single felony conviction for the purposes of the Habitual Criminal Act was instituted to prevent the precise situation which we find here:

> Although prior to the Code's enactment most circuit judges treated convictions for burglary and grand larceny as a single prior conviction for purposes of habitual offender sentencing, a few apparently considered such a disposition to constitute two convictions. To achieve some parity of treatment in calculating the number of prior convictions, subsection (3) consolidates a burglary and the offense that was its object into a single felony conviction for habitual offender purposes.

Arkansas Statute Revision Commission, "Commentary," 4 Arkansas Statutes 1947 Annotated, at p. 123.

[14]Section 41-102 of the Arkansas Criminal Code of 1975 provides:

Application of provisions. — (1) The provisions of this Code * * * shall govern the prosecution for any offense defined by this Code and committed after the effective date [January 1, 1976] hereof.

(2) Unless otherwise expressly provided, the provisions of this Code shall govern the prosecution for any offense defined by a statute not part of this Code and committed after the effective date hereof.

that the failure to afford Klimas a jury redetermination of this charge was in no way prejudicial to him.

The order dismissing Klimas's petition is vacated, and the case remanded to the District Court. Upon remand, the District Court shall hold the petition in abeyance in order to afford the State of Arkansas the opportunity to resentence Klimas by jury in accordance with Arkansas law. If the State fails to initiate a resentencing procedure in Arkansas state court within a reasonable time, the District Court shall grant the writ.

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CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(3) The provisions of this Code do not apply to the prosecution for any offense committed prior to the effective date of this Code. Such an offense shall be construed and punished in accordance with the law existing at the time of the commission of the offense.

(4) A defendant in a criminal prosecution for an offense committed prior to the effective date of this Code may elect to have the construction and application of any defense to such prosecution governed by the provisions of this Code. * * *

(5) When all or part of a statute defining a criminal offense is amended or repealed, the statute or part thereof so amended or repealed shall remain in force for the purpose of authorizing the prosecution, conviction and punishment of a person committing an offense under the statute or part thereof prior to the effective date of the amending or repealing act.

It is unclear, under this section, whether a charge of habitual criminality is an "offense" and, if so, whether its "commission" in a case such as this would be at the time of the commission of the latest underlying felony (here, prior to the effective date of the Code) or at the time that an individual's status as a habitual criminal is determined (here, at the time of the retrial of the habitual criminal charge). It is also unclear whether the fact that burglary and the larceny which was its object are considered to be a single offense under the new provisions of the Habitual Criminal Act could be argued to the jury in a retrial of Klimas under the old law, as a mitigation of his record and the degree of habitual criminality which the jury might find.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. _____

JAMES. MABRY, COMMISSIONER
ARKANSAS DEPARTMENT OF CORRECTION ..... *Petitioner*

vs.

FRANCIS EDWARD KLIMAS ..... *Respondent*

APPENDIX C

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 78-1663

Francis Edward Klimas,

Appellant,

v.

James Mabry, Commissioner, Arkansas Department of Correction,

Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

Filed: August 13, 1979

HENLEY, Circuit Judge, Dissenting from Action of Court in Denying Rehearing En Banc.

After the panel opinion in this case was filed on May 30 of this year, counsel for respondent requested a rehearing but did not request a rehearing en banc. Deeming the questions presented to be serious and not being satisfied with the result reached by the panel, I requested that the full court be polled as to whether the case should be reheard en banc. Rule 7, United States Court of Appeals for the Eighth Circuit.

My view was that the State of Arkansas should be given the option of having petitioner sentenced to imprisonment for not more than 21 years[1] or of giving him a new trial on all issues and not simply on the issue of length of sentence.

While the request for a poll gained some support, a majority of judges voted against it, and as a consequence rehearing and rehearing en banc were denied. For reasons to be stated, I dissent from the action of the majority of the court in permitting the panel opinion to stand without rehearing.

In my opinion the decision of the court undercuts and largely destroys what I consider to be a desirable Arkansas procedural practice where a defendant has been convicted of being an habitual criminal on evidence of both valid and invalid (or unsatisfactorily evidenced) convictions of prior offenses. In appellate context, the established practice has been for the Supreme Court of Arkansas to direct that the invalid prior convictions be ignored and to remand the case with the State being given the following option: (1) To agree to a minimum sentence being imposed on the defendant on the basis of undisputed validly established convictions; or, (2) to agree to a new trial for the defendant on all issues, not just the issue of proper punishment.

[1]I felt that in its opinion on rehearing in this case the Supreme Court of Arkansas erroneously proceeded on the premise that the minimum sentence that could have been imposed on petitioner by the Circuit Court was 42 years (two 21 year sentences to be served consecutively); the Circuit Court could have made the sentences run concurrently, Ark. Stat. Ann. § 43-2312 (1964 Repl.), in which case the minimum sentence to which petitioner could have been subjected would have amounted to 21 years.

That practice was basically followed by the Arkansas Supreme Court in this case, *Klimas* v. *State*, 534 S.W.2d 202, 207 (Ark. 1976),[2] and upon remand the State agreed to a 42 year sentence that was imposed. The practice had been followed in the earlier Arkansas cases of *McConahay* v. *State*, 516 S.W.2d 887 (Ark. 1975), and *Wilburn* v. *State*, 487 S.W.2d 600 (Ark. 1972). We expressly approved the practice in *Cox* v. *Hutto*, 589 F.2d 394 (8th Cir. 1979), and while on the district bench in 1974 I approved it in the unpublished opinion in *Thacker* v. *Hutto*, No. PB-74-C-225 (E.D. Ark.), with my decision being affirmed in the likewise unpublished opinion in *Thacker* v. *Hutto*, No. 74-1912 (8th Cir. 1975).

The option granted to the State by the court in this case is: (1) Do nothing and let the district court set aside the petitioner's conviction, issue its writ of habeas corpus and thus set the petitioner at liberty; or, (2) within a limited period of time cause to be conducted in the sentencing state court a jury hearing to determine the length of sentence that should be imposed on the petitioner without regard to prior invalid convictions or to convictions, the validity of which is not established satisfactorily.

It seems that the decision of the court understandably may have been influenced by two things: First, the extremely severe sentence imposed on this petitioner for comparatively minor, but not trivial, "property crimes" involving no violence or threat of death or injury to others; second, the fact that between the date of petitioner's conviction in the Circuit Court and the date of the decision of this court,the Arkansas criminal code was extensively rewritten by Act 280 of 1975 which became effective on

[2]*But see* n.1, *supra*.

January 1, 1976 and which, at least in one respect, is beneficial to recidivist criminals[3] The opinion of the court suggests that the liability of the petitioner to punishment on remand proceedings might be governed by the "new" rather than the "old" law. I have a good deal of trouble with that suggestion, largely because I believe that due process requires only that petitioner receive the minimum sentence to which his undisputed valid convictions would have subjected him at time of trial.

The panel opinion recognizes that retrial may be futile where evidence of prior convictions properly submitted to a jury is unchallenged by the defendant, *citing Roach* v. *State*, 503 S.W.2d 467 (Ark. 1973), and *Cox* v. *Hutto, supra*, 589 F.2d at 394, and inferentially at least concedes that absent a change in the habitual criminal statute the due process violation it found might be rendered harmless. The panel goes on to hold, however, that because it is uncertain whether the new law or the old law would apply on retrial, the writ should issue or a new sentencing hearing should be held. As indicated, I think the new Act is irrelevant to the federal constitutional question presented and to the correction of the constitutional error found.

Aside from that, I question the soundness or practicality of the approach that the court has taken. It is hard to suppose that the same jury that sentenced petitioner nearly five years ago can be reconstituted or that all of the members of that jury would

[3]Prior to the effective date of the 1975 statute, burglary and grand larceny were viewed as separate and distinct offenses for habitual criminal statute purposes even though the two crimes were committed as part of the same overall act of criminal conduct. Now, as the court recognizes, a burglary followed by a larceny is considered to be a single offense for purposes of the habitual criminal statute.

still be qualified to sit in petitioner's case. And there is no Arkansas procedure for the empanelment of a new jury to consider punishment without regard to underlying questions of guilt. Further, if a new jury is empaneled, it may be doubted that it can consider punishment intelligently without considering underlying guilt and its circumstances as well as prior offenses. Moreover, if a new jury is empaneled to consider either guilt or punishment, or both, serious questions of double jeopardy will arise.

And, then, I doubt that the holding of the court is going to be of any real benefit to the petitioner in this case. In fact, under the decision he may wind up in a worse situation than that in which he now finds himself.[4]

The court should decide en banc the questions presented and on rehearing sbould act consistently with its own prior decisions and those of the sovereign State of Arkansas by giving the State the option of reducing the sentence to the minimum under the old law or of affording Klimas a new trial at which the state courts, of course, would be free to decide which of its sentencing statutes applied. By so acting this court would leave intact the structure of the law.

[4]We, of course, have no way of knowing what course this case will take on remand. The State may simply let the case drop and permit petitioner to be released under the writ of the district court. But on retrial under either the "old law" or the "new law" petitioner may receive a sentence substantially in excess of the 21 years I have postulated.

I am authorized to say that Chief Judge Gibson and Judge Ross join in this statement.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.